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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

72-966

CONFEDERATION LIFE INSURANCE COMPANY,
Petitioner,

v.

REYES ARIDA CONTE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

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January 1973

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No.

CONFEDERATION LIFE INSURANCE COMPANY,
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v.

REYES ARIDA CONTE, *Respondent.*

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

Petitioner, Confederation Life Insurance Company,[1] prays that a writ of certiorari be issued to review the decision of the Supreme Court of Florida entered in this case.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida for the Third District, which is reported at 254 So. 2d 45, appears at p. 1a, *infra*. The opinion of the Supreme Court of Florida is not yet reported; it appears at p. 5a, *infra*.

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[1] Petitioner, styled Confederation Life Association in the courts below, has undergone a change of name and the caption of this petition reflects that change. Petitioner continues to be a mutual insurance company.

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JURISDICTION

The opinion of the Supreme Court of Florida was entered on July 19, 1972, and constitutes the judgment of that court. A timely petition for rehearing was denied by that court on October 10, 1972, by an order which appears at p. 7a, *infra*. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

QUESTIONS PRESENTED

1. Whether Florida has violated the Due Process Clause of the Fourteenth Amendment by applying its own local law to enlarge contractual obligations of a foreign company under an insurance contract made in Cuba, payable in Cuban legal tender, covered by reserves located in Cuba, performable by its express terms in Cuba, and insuring the life of one who when the contract was made was a domiciliary of Cuba.

2. Whether Florida has transgressed international law and thus infringed the authority of the Federal Government over foreign affairs by applying local law to a wholly foreign transaction with which Florida has no connection.

3. Whether by disregarding the effect of Cuban currency legislation governing a Cuban contract Florida has acted inconsistently with the act of state doctrine, which this Court has held to be binding in both state and federal judicial proceedings.

CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the provision of the Fourteenth Amendment of the United States Constitution providing that no state shall "deprive any person of . . . prop-

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erty, without due process of law" and the constitutional authority of the Federal Government over foreign affairs.

STATEMENT

For many years prior to 1951, Cuba maintained a highly unusual "dual currency" regime. (Tr. 72-74.)[2] Under Cuban law during this period, the United States dollar constituted legal tender in Cuba alongside the Cuban peso. Consequently, contracts written in Cuba at this time often specified dollars as the domestic Cuban currency of payment. (Tr. 132.)

Petitioner, Confederation Life Insurance Company ("Confederation"), is a Canadian mutual insurance company which for many years has provided life insurance in countries throughout the world including Cuba and the United States. In 1944, Confederation, through its Havana office, issued a 20-year endowment insurance policy to the respondent, a Cuban citizen who then resided in Cuba. (Tr. 19.)

Both respondent's application and the contract itself were written in Spanish. (Tr. 8-18.) The contract was made in Cuba. The application was executed in Cuba. (Tr. 35-38, 131.) The policy was not valid until notarized in Cuba, and notarization took place there. (Tr. 34.) Moreover, by the express terms of the application the policy became effective only on its delivery and on payment of the first premium (Tr. 38, 131), and both of these events occurred in Cuba through Confederation's Havana office (Tr. 131). The insurance contract was not only made in Cuba but it expressly

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[2] References designated "Tr. —" are to the partial transcript of record filed in the Supreme Court of Florida containing pertinent extracts from the record.

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provided that Cuba was the place of performance of Confederation's obligations:

> "PLACE OF PAYMENT.—All sums payable or exigible [demandable] under this policy shall be paid at the principal office of the Association in the city of Havana, Republic of Cuba." (Tr. 23.)

As was true of many of Confederation's policies under Cuba's pre-1951 dual currency regime, the policy provided that payments under it should be made "in lawful currency of the United States of America" (Tr. 23), which was then one of Cuba's two domestic currencies of legal tender status. The amount of the policy was $4,000. On June 30, 1951, however, Cuba withdrew the legal tender status of the dollar and provided that all previously contracted dollar obligations payable in Cuba would be payable at the rate of one peso per dollar. (Tr. 74.) This legislation converted the policy from one payable in dollars to one payable in an equivalent number of pesos. (Tr. 133.)

In the next premium notice after June 30, 1951, Confederation notified its policyholders that, in accordance with the legislation, all premiums and all company obligations stated in dollars "will from now on be payable in Cuban national currency at par . . . ." (Tr. 134.) The respondent did not terminate his policy but continued to pay premiums on it. His premiums were thereafter paid in pesos or by dividends and automatic premium loans. (Tr. 135-36.) His policy continued to constitute a part of Confederation's Cuban business, which was subject to Cuban governmental supervision and on which taxes were paid to the Cuban Government.

The Government of Cuba was overthrown in January 1959 and a new Cuban Government under Fidel Castro was installed. Shortly thereafter, the United States

recognized the Castro regime as the legitimate government of Cuba, and that recognition continues in effect today. By legislation in September 1959 and February 1961, the new Cuban Government reconfirmed and reinforced the 1951 legislation.[3] Based on the uncontroverted sworn statement of the expert witness on Cuban law, a former Justice of the Supreme Court of Cuba, the Cuban legislation prohibits payment of the respondent's policy by Confederation in any currency other than pesos and in any place other than Cuba, and it provides for severe criminal sanctions in the event of violations. (Tr. 75.)

Since 1951 Confederation has maintained in Cuba peso reserves sufficient to cover its obligations under Cuban policies. (Tr. 136.) Those reserves cannot under Cuban law be transferred to the United States, nor does the company maintain dollar reserves against Cuban policies. (Tr. 136-37.) Although it no longer writes insurance policies in Cuba, Confederation has maintained its Havana office to service policies previously written in that country by making payments in pesos there pursuant to Cuban law. Where the insured or beneficiary so desires, Confederation is willing and able to hold benefits now payable until requested to pay them to claimants.

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[3] The September 1959 law (Tr. 75, 107-11) made any unauthorized transfer of funds abroad by any means "a felony of currency contraband" rendering guilty individuals liable to severe imprisonment and fines; companies found to violate the law were made subject to "intervention" which amounts to government seizure of the company. The law passed in February 1961 reconfirmed that pesos alone were legal tender in Cuba and said all obligations payable in Cuba, whether or not agreed upon in another currency, "shall be settled and paid necessarily" in Cuban currency. (Tr. 75, 112-25.)

The respondent left Cuba at a date not disclosed by the record. After the endowment feature of his policy matured in 1964 he asked Confederation to pay him $4,000 in Florida. Confederation stated its willingness to pay in accordance with its contract, in Cuba in pesos. (Tr. 137.) Respondent brought suit. On cross-motions for summary judgment, judgment was given for him by the trial court for $4,000.

The District Court of Appeal for the Third District reversed in part, holding that judgment should be for the dollar equivalent of 4,000 pesos. Both parties petitioned the Florida Supreme Court for certiorari. Confederation's petition was denied. Respondent's petition was granted, and the Florida Supreme Court reversed the District Court of Appeals. In reliance upon its decision in *Lara* v. *Confederation Life Ass'n*, 257 So. 2d 42 (Fla. 1971), which was brought here on petition for a writ of certiorari as No. 71-1487, certiorari denied, October 23, 1972, the court ordered reinstatement of the trial court's judgment for the dollar amount of the policy, *i.e.*, $4,000.

The decision made clear that *Confederation Life Ass'n* v. *Ugalde*, 164 So. 2d 1 (Fla.), *cert. denied*, 379 U.S. 915 (1964), no longer stated the law of Florida. In that case the court had held, in accordance with traditional Florida choice-of-law rules, that a Confederation policy similar to the one involved here "was a Cuban policy covered by Cuban law," which according to the governing law had become a peso policy and which had not been breached since Confederation was prepared to perform by paying pesos in Havana. 164 So. 2d at 2. *Ugalde* was explained in the opinion below as resting upon the International Monetary Fund agreement, to which Cuba was a party at the time of decision but from which it later withdrew.

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(The explanation is wholly unpersuasive because, as the petition for certiorari and other papers filed with this Court at the time disclose, No. 452, October Term 1964, Cuba withdrew from the IMF shortly after the *Ugalde* decision; the withdrawal was invited to the Florida court's attention by a motion for remand, and the court was not moved to alter its decision, which was based independently on the Florida choice-of-law doctrine indicated above.)[4]

Throughout the proceeding below, Confederation asserted that for a Florida court to enlarge its obligations as defined by Cuban law would represent an application of local law to an entirely foreign transaction in violation of the Due Process Clause of the Fourteenth Amendment; and, by this action and by disregarding the operation of a Cuban currency law on a Cuban contract, Florida would involve the United States in a violation of international law and contravene the act of state doctrine enunciated by this Court.[5]

REASONS FOR GRANTING THE WRIT

The issues presented in this case are the same as those in *Confederation Life Ins. Co.* v. *Lara,* No. 71-1487, in which the Court, over the dissent of Mr. Justice Brennan, joined by Mr. Justice Douglas, denied certiorari on October 23, 1972. There are substantial allegations that by the application of Florida law to a contract with which Florida has no contact and that is clearly governed by Cuban law the Florida Supreme

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[4] See, particularly, Brief for Respondents in Opposition, *Ugalde* v. *Confederation Life Ass'n*, No. 452, O.T. 1964, pp. 6-7.

[5] Confederation raised the federal questions in the Florida courts in its answer to the complaint and a motion addressed thereto (Tr. 39-40, 44, 55, 59, 62-63) and in its brief in the District Court of Appeal (pp. 38-42) and its brief on the merits in the Florida Supreme Court (pp. 34-38).

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Court has deprived Confederation of property without due process of law in violation of the Fourteenth Amendment, has placed the United States in violation of international law and has ignored the act of state doctrine. The questions are important from the standpoint of United States relationships with Canada, which formally expressed its concern in the *Lara* case, and from the standpoint of Confederation's potential liability on Cuban policies. The potential liability runs into many millions of dollars. Because Confederation is a mutual insurance company that cannot bring its reserves held against those policies out of Cuba, the liability could only be satisfied at the expense of its other policyholders.

Unlike the *Lara* case, the present case comes here unencumbered by references in the opinions below to the Canadian decision, *Imperial Life Assurance Co.* v. *Colmenares*, [1967] Can. L. Rep. 443 (Sup. Ct.). The Canadian Supreme Court there had before it an insurance contract written through a Canadian insurance company's Havana office that the court found to have been made in Canada and under which premiums and benefits were expressed to be payable in bank drafts drawn on New York. The court on this basis applied Canadian law to determine obligations under the contract. Confederation's policies are quite different from the policy considered in the *Colmenares* case, and the Confederation policy at issue here could not be found to be a Canadian contract.

It was urged in *Lara* that, because the trial court had referred to the *Colmenares* decision and said that Canadian law governed the contract, this was the Florida Supreme Court's ground of decision. Although the Justices who dissented from the denial of certiorari thoroughly refuted this view, it may have been thought

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to complicate matters so as to make the *Lara* case an inappropriate vehicle for the consideration of the questions presented both in that case and here. There is no such complication in this case. It is perfectly clear now that the Florida courts have applied and in all events will apply their own law so as to render Confederation liable in dollars on all of its Cuban insurance contracts that were originally expressed in dollars.

We summarize below the considerations that call for granting the writ that were stated in the petition in *Lara*. Copies of the *Lara* petition and reply brief are being served upon respondent along with this petition.

1. The Due Process Clause of the Fourteenth Amendment forbids any state to apply its local law to alter substantive obligations arising out of a foreign transaction having no significant relation to the state. As Mr. Justice Brennan said in his dissent in the *Lara* case, after quoting from the foregoing statement as it was made in the *Lara* petition:

> "The general validity of that proposition is clearly established by *Home Insurance Co.* v. *Dick*, 281 U.S. 397 (1930), where we held that the State of Texas was without power to affect the terms of the contracts since all acts relating to the making of the policy were done in Mexico. In an opinion by Mr. Justice Brandeis, the Court held that the attempt by the Texas courts 'to impose a greater obligation than that agreed upon and to seize property in payment of the imposed obligation violates the guaranty against deprivation of property without due process of law.' 281 U.S., at 408."

Mr. Justice Brennan went on to point out that in *Clay* v. *Sun Ins. Office, Ltd.*, 377 U.S. 179 (1964), the Court had "reaffirmed by implication" the validity of *Dick* while concluding that on the facts of *Clay* it was

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reasonable for the state to apply its own law. *Dick* was described as a case in which the forum state's relationship to the transaction was "wholly lacking," and *Hartford Accident & Indem. Co.* v. *Delta & Pine Land Co.*, 292 U.S. 143 (1934), as a case in which the relationship was "too slight and too casual" to permit application of the forum state's law. 377 U.S. at 182. Mr. Justice Brennan urged plenary review to determine whether the *Lara* case was controlled by *Dick* and *Delta Pine & Land Co.* or was within the permissible range of forum state action established in *Clay*.

The same question is posed again here just as clearly. It is true that in *Lara* the insured had lived in Cuba until his death, but two of the six beneficiaries who sued on the contract had become residents of Florida, just like the respondent policyholder here. Residence in Florida is immaterial. In *Dick* the insured's permanent residence was in Texas, and the Court considered this fact "without significance" since the critical contractual events all occurred in Mexico. 281 U.S. at 408.

Just as we urged in *Lara*, there are circumstances here that give particular point to Confederation's appeal to the idea of fairness that underlies the Due Process Clause. The decision of the court below is an illogical and unexplained departure from the traditional conflicts rules that the Florida courts have applied in the past and have continued to apply contemporaneously with this case in disputes not involving Cuban insurance contracts. See, *e.g.*, *State-Wide Ins. Co.* v. *Flaks*, 233 So.2d 400, 402 (Fla. Dist. Ct. App.), *cert. dismissed*, 238 So.2d 427 (Fla. 1970). The Florida Supreme Court, moreover, has never even commented on the substantial federal questions presented to it.

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Inevitably the suspicion arises that a foreign corporation is not receiving the even-handed justice that it has the right to expect in American courts.

Further, the present controversy is arising repeatedly in the American courts so that resolution by this Court will be of great precedential importance. Confederation estimates that under the decision below and other Florida decisions its liabilities to Cubans under Cuban policies approximate $15 million, and a far larger amount may ultimately be at stake; the Cubans who have immigrated to this country, now estimated to number approximately 400,000, necessarily include a very large number of insureds and beneficiaries. Suits involving Cuban insurance policy claims against Confederation alone, quite apart from suits involving other insurers, have already been litigated in state and federal courts and many more are virtually inevitable.[6]

Finally, there is the ever-present threat that the Cuban Government will act against Confederation if it is compelled to discharge Cuban obligations, payable in pesos in Cuba, through the payment of dollar judgments in the United States. Confederation has been responsibly advised by an expert in Cuban law that Cuba prohibits dollar payments of the Cuban obligations here involved (Tr. 75), and the company has both assets and employees in Cuba that are subject to the severe sanctions applicable under Cuban law for acts

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[6] Every court apart from the Florida state courts which has considered a comparable claim against Confederation on one of its Cuban policies has held that Cuban law applies to determine the company's obligations. *E.g.*, Johansen v. Confederation Life Ass'n, 312 F. Supp. 1056 (S.D. N.Y. 1970), *aff'd*, 447 F.2d 175 (2d Cir. 1971); Ramil v. Confederation Life Ass'n, Equity No. 88020, Mass. Superior Court, Dec. 22, 1971.

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that government construes as violating its currency restrictions (Tr. 136).

2. The improper application of Florida law in the present case not only violated the Fourteenth Amendment but involved the United States in a breach of international law. International law is violated when courts prejudicially alter the rights and obligations of a foreign national arising out of a transaction having little or no substantial contact with the forum state. See *Restatement (Second), Foreign Relations Law of the United States* § 19 & comment d (1965). The principle that foreign contract rights cannot be abrogated by local courts has been asserted by the United States Government in espousing a claim on behalf of American citizens. *The Alsop Claim* (*United States* v. *Chile*), 5 Am. J. Int'l L. 1079 (1911).[7] Here the rights of a Canadian national under Cuban law have been abrogated by the Florida courts.

By injuring a foreign national through a violation of international law, "the court commits an international delict and subjects the State to diplomatic representations or the possible award of damages or other reparation by an international tribunal." Stevenson, *The Relationship of Private International Law to Public International Law*, 52 Colum. L. Rev. 561, 574 (1952) (footnote omitted); 5 Hackworth, *Digest of International Law* § 522 (1943); Briggs, *The Law of Nations* 677-80 (1952).

It is no defense to claims against the United States that the injury was done by a state rather than a fed-

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[7] See U.S. Dep't of State, *The Alsop Claim—The Case of the United States* 198-220 (GPO 1910). The claim failed in that instance on several grounds, but the tribunal did not question the principle asserted by the United States. See 5 Am. J. Int'l L. at 1097.

eral court since under international law the conduct of a political sub-unit in causing injury to an alien is "attributable" to the national government. *Restatement (Second), Foreign Relations Law of the United States* § 170 (1965); 5 Hackworth, *Digest of International Law* § 527 (1943). Indeed, it is the responsibility of the United States for Florida's action under international law, and the adverse consequences of that action upon the conduct of foreign affairs by the United States, that make that action a matter of direct federal concern and accordingly render it subject to overriding federal law. *Zschernig* v. *Miller,* 389 U.S. 429 (1968); *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964).

When the courts in this country improperly extend local law to regulate foreign transactions, they establish a precedent no less applicable to Americans in foreign courts. As this Court said in *Lauritzen* v. *Larsen,* 345 U.S. 571, 582 (1953):

> "[I]n dealing with international commerce we cannot be unmindful of the necessity for mutual forbearance if retaliations are to be avoided; nor should we forget that any contact which we hold sufficient to warrant application of our law to a foreign transaction will logically be as strong a warrant for a foreign country to apply its law to an American transaction."

3. The decision of the Florida Supreme Court conflicts with the act of state doctrine recently reaffirmed by this Court in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), and even more recently in *First Nat'l City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972). Under that doctrine an American court may not in the course of deciding a controversy re-ex-

amine, nullify or disregard an act of state of a recognized foreign government so far as that act has determined rights or obligations which are subject to its jurisdiction. This Court has said that under the governing principle "when it is made to appear that a foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Banco Nacional de Cuba* v. *Sabbatino, supra* at 418, quoting *Ricaud* v. *American Metal Co.,* 246 U.S. 304, 309 (1918).

In this instance, the legislation of the Cuban Government, depriving the dollar of legal tender status in Cuba and converting dollar obligations payable in Cuba into peso obligations, was certainly an act of state of the most traditional kind. In a mirror image of the Cuban legislation, Congress provided in the Foraker Act § 11, 31 Stat. 77, 80 (1900), for the substitution of United States dollars for Puerto Rican pesos after that province was ceded to the United States, and existing peso obligations in Puerto Rico were thereby converted into dollar obligations at the ratio provided in the statute. This Court approved the Foraker Act's application to a pre-existing contract in *Serralles' Succession* v. *Esbri,* 200 U.S. 103 (1906), and that case is only one of a number of decisions throughout the years confirming that this and comparable currency legislation are conventional exercises of national legislative authority.[8]

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[8] Guaranty Trust Co. v. Henwood, 307 U.S. 247, 258-59 (1939); Norman v. Baltimore & O. R.R., 294 U.S. 240, 307-08 (1935); Legal Tender Cases, 79 U.S. (12 Wall.) 457, 548-49 (1870). As the Court said in the *Legal Tender Cases:* "Every contract for the payment of money, simply, is necessarily subject to the constitu-

The Cuban legislation in this case operated upon contractual obligations arising under Cuban law, performable in Cuba and relating to insurance upon the life of a Cuban national. The act of state doctrine is no less applicable because the legislation of the Cuban Government was directed to contractual interests arising under local law rather than to tangible personal property located within the territory.[9]

A situation analogous to the present case would exist if an insurance company issued to an American citizen in this country a policy providing for payment in gold in the United States, and the federal government thereafter passed legislation converting such contracts into dollar contracts and rendering payment in gold unlawful. Compare *Norman* v. *Baltimore & O. R.R.*, note 8 *supra*. If the insured thereafter brought suit in England against the company, demanding payment in gold in England, it is apparent that an English court could not consistently with the act of state doctrine disregard the American legislation and require the insurer to make payment in gold.[10]

In such a situation the United States would have a legitimate interest in the English court's respect for the legislation. Similarly, the insurance company,

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tional power of the government over the currency . . . and the obligation of the parties is, therefore, assumed with reference to that power." 79 U.S. (12 Wall.) at 549.

[9] The act of state doctrine is fully applicable to acts of state which affect intangible commercial rights, *e.g.*, American Banana Co. v. United Fruit Co., 213 U.S. 347 (1909) (unfair competition), and rights having no relation to property at all, *e.g.*, Underhill v. Hernandez, 168 U.S. 250 (1897) (false imprisonment).

[10] As this Court noted in the *Sabbatino* case, 376 U.S. at 421-22 n. 21, the English courts do follow the act of state doctrine.

having contracted in the United States with an American citizen, would reasonably expect to perform its obligations in accordance with American law. The action of the Florida courts sought to be reviewed here ignores precisely equivalent interests and violates the act of state doctrine, which is designed to protect them. If the United States is not prepared to ensure that those interests are protected when foreign companies and foreign governments are involved, there will be no basis for it to complain when foreign courts disregard its acts of state to the detriment of comparable American interests.

CONCLUSION

For the reasons stated above, the writ of certiorari should be granted.

Respectfully submitted,

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January 1973

APPENDIX

APPENDIX

IN THE DISTRICT COURT OF APPEAL OF FLORIDA
THIRD DISTRICT
JULY TERM, A.D. 1971

Case No. 71-24

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation,
Appellant,

vs.

REYES ARIDA CONTE, *Appellee.*

Opinion filed October 26, 1971.

An Appeal from the Circuit Court for Dade County, John J. Kehoe, Judge.

* * *

Before SWANN, C.J., and CHARLES CARROLL and BARKDULL, JJ.

PER CURIAM.

Confederation Life Association, a Canadian corporation, appeals from a summary final judgment for plaintiff, Reyes Arida Conte.

Conte sued the Association and alleged it issued to him in Havana, Cuba, a 20 year endowment policy in the sum of $4,000.00; that he made the yearly payments for twenty years to the association; that he was now a resident of Miami, Dade County, Florida; that he demanded payment of $4,000.00 (the matured value of the policy) but the defendant refused and still refuses to pay except in Cuban pesos in Havana, Cuba. He alleged that because a communist revolutionary government seized power in Cuba in 1959 and because plaintiff was classified as an enemy of the state by that government, by reason of his democratic ideals, the plaintiff was forced to flee Cuba; that plaintiff

could not return to Cuba because of fear for his life or imprisonment as an enemy of the state; that any sum payable to him in Cuba would be immediately confiscated by the Cuban government and it would be a futile act to attempt to accept payment in Cuba; that plaintiff had no adequate remedy at law and, therefore, prayed that the court of equity order defendant to pay him the sum of $4,000.00 U. S. dollars, together with attorneys' fees, in the United States, pursuant to the subject insurance policy in order to prevent the defendant from being unjustly enriched.

The motion of the Association to dismiss the complaint for failure to state a cause of action was denied. In its answer the defendant admitted the policy was issued to plaintiff in Havana, Cuba but generally denied the rest of the allegations in the complaint and set forth various affirmative defenses. Plaintiff filed a motion for final summary judgment, together with a supporting affidavit. Defendant filed opposing affidavits, showing certain facts in support of its answer and certain of its affirmative defenses.

The trial court heard argument on the motion for final summary judgment and entered a summary final judgment for plaintiff and against the defendant, in the amount of $4,000.00 U. S. dollars, together with court costs. The court reserved jurisdiction for the purpose of awarding attorneys' fees to counsel for the plaintiff. The defendant's motion for rehearing and modification of final summary judgment was denied. The defendant filed its notice of appeal and the cause is now before us.

Our examination shows this insurance policy was issued to a Cuban resident, in Cuba, and that all premium payments were made in Cuba. There is some dispute as to whether the premium payments were made in pesos or in dollars but this would not create a material issue of fact because even if it were established that the insured paid and the company accepted dollars after the passage of

certain Cuban currency laws, this would be insufficient to invoke an estoppel as each party would have been guilty of a violation of law. See Montsdoca v. Highlands Bank & Trust Co., 85 Fla. 158, 95 So. 666 (1923); and Northwestern National Casualty Company v. McNulty, 307 F.2d 432 (5 Cir. 1962).

The insured moved to Florida and demanded the association pay him the matured value of the endowment policy in dollars in Florida. It refused but offered to pay him only in pesos in Havana, Cuba. He sued in equity and recovered a judgment for the matured value of the policy in dollars.

We are unable to discover a second contract with a situs in the United States under these facts. See Confederation Life Association v. Vega y Arminan, Fla. App. 1968, 207 So. 2d 33, aff'd Fla. 1968, 211 So. 2d 169. We hold the second contract theory pronounced in Vega does not apply to the facts herein.

The Association cannot escape from its obligation by attempting to require a Cuban resident who has fled to the U.S.A. for his safety or life to return to Cuba to collect money obviously due under an insurance policy. Such conduct is clearly inequitable; cannot be countenanced and constitutes a breach of contract. Insurance contracts are transitory and the insured may sue, as here, in a jurisdiction other than where the policy was issued, or is to be performed. Confederation of Canada L. Ins. Co. v. Vega y Arminan, Fla. App. 1962, 135 So. 2d 867; cert. denied, Fla. 1962, 144 So. 2d 805.

Since no second contract theory applies, the final judgment must be for plaintiff but should be in the dollar equivalent of the pesos due to plaintiff. See Johansen v. Confederation Life Association, 312 F. Supp. 1056, (S.D. N.Y. 1970); Confederation Life Association v. Ugalde, Fla. App. 1963, 151 So. 2d 315, cert. granted, Fla. 1964, 164

So. 2d 1 (rev'd on other grounds), cert. denied 379 U.S. 915 (1964).

Judgment for plaintiff is affirmed but that part of the judgment expressed in U. S. dollars is reversed.

On remand judgment for plaintiff for the matured value of the policy should be expressed in a dollar value equivalent to the proper conversion rate from pesos. See United States Life Insurance Company v. Alonso, Fla. 1967, 201 So. 2d 577.

Affirmed in Part; Reversed in Part.

C. J. Swann—I concur in part and dissent in part.

In addition to the second contract principle pronounced in Vega, 207 So. 2d 33, we held that Cuba had withdrawn from the International Monetary Fund and the laws of a non-member nation are not given extraterritorial effect under the terms of the Bretton Woods Agreement.

We approved, in Vega, a decree which held that provisions for payment of insurance proceeds in Havana, Cuba were for the convenience of the parties only and held that such clauses were not a bar to recovery in Florida. Cf. Gonzalez y Comejo v. Sun Life Assurance Co. of Canada, 313 F. Supp. 1011 (D.C. Puerto Rico 1970).

In addition, I think we can take judicial notice that it would be impossible for a Cuban who has fled to the U.S.A. from Cuba to return thereto, collect pesos due under an insurance policy in Havana, and safely return to the United States with his property. See 17 Am. Jur. 2d Contracts § 420.

I would affirm the final judgment.

IN THE SUPREME COURT OF FLORIDA
JULY TERM, A.D. 1972

Case No. 41,888

REYES ARIDA CONTE, *Cross-Petitioner,*

-VS-

CONFEDERATION LIFE ASSOCIATION, a Canadian corporation, *Cross-Respondent.*

Opinion filed July 19, 1972

Cross-Petition for Writ of Certiorari to the District Court of Appeal, Third District

• • •

BOYD, J.

This cause came before us on petition and cross-petition for writ of certiorari to review the decision of the District Court of Appeal, Third District, reported at 254 So. 2d 45. The petition was denied without argument by Order dated April 4, 1972, and the cause retained for argument on the cross-petition.

Cross-petitioner questions the action of the District Court in reversing the trial court's award of $4,000.00 United States dollars, the face value of a twenty-year endowment contract issued by petitioner in Cuba. In reversing the portion of the judgment expressed in United States dollars for the plaintiff, the District Court stated:[1]

> "On remand judgment for plaintiff for the matured value of the policy should be expressed in a dollar value equivalent to the proper conversion rate from pesos."

The foregoing holding of the District Court was rendered prior to this Court's decision in *de Lara* v. *Confederation*

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[1] 254 So. 2d 45, 47 (Fla. App. 3rd 1971).

Life Association,[2] and is in conflict therewith. In *de Lara*, we held that beneficiaries under a life insurance policy issued in Cuba to a Cuban National could recover the face amount of the policy in the United States in United States dollars. In *de Lara*, as in the instant case, the policy provided that all sums payable under the policy "shall be paid in lawful currency of the United States of America." However, some years after the policy in the instant case and the one in *de Lara* were issued, Cuban monetary laws were enacted which required that all policies be payable in pesos only.

The Cuban monetary laws were held binding and effective in this country in *Confederation Life Association* v. *Ugalde*,[3] because of the International Monetary Fund Agreement. But Cuba withdrew from the International Monetary Fund Agreement effective April 2, 1964. Thereafter, this Court in *Confederation Life Association* v. *Vega*,[4] approved the decision of the District Court of Appeal, Third District,[5] holding that since Cuba had withdrawn from the International Monetary Fund Agreement, Cuban laws would no longer be given extra-territorial effect under the terms of the Bretton Woods Agreement.

Accordingly, certiorari is granted and that portion of the District Court's opinion reversing the award of the face value of the policy in United States dollars, is quashed and the cause remanded with directions to reinstate the trial court's award in the amount of $4,000.00.

It is so ordered.

ROBERTS, C.J., ERVIN, CARLTON, ADKINS, MCCAIN and DEKLE, JJ., Concur.

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[2] 257 So. 2d 42 (Fla. 1972).

[3] 164 So. 2d 1 (Fla. 1964).

[4] 211 So. 2d 169 (Fla. 1968).

[5] 207 So. 2d 33 (Fla. App. 3rd 1968).

JULY TERM, A.D. 1972

Tuesday, October 10, 1972

Case No. 41,888

CONFEDERATION LIFE ASSOCIATION, ETC.,
Petitioner, Cross-Respondent,

vs.

REYES ARIDA CONTE, *Respondent, Cross-Petitioner.*

On consideration of the petition for rehearing filed by attorneys for cross-respondent,

IT IS ORDERED by the Court that said petition be and the same is hereby denied.

ROBERTS, C.J., ERVIN, CARLTON, ADKINS, BOYD, McCAIN and DEKLE, JJ., concur.

A True Copy
TEST:

SID J. WHITE

Sid J. White
Clerk Supreme Court.

In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-966

CONFEDERATION LIFE INSURANCE COMPANY

v.

REYES ARIDA CONTE

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

MEMORANDUM TRANSMITTING LETTER AND NOTE

Pursuant to the request of the Acting Legal Adviser of the Department of State, I am transmitting his letter to me of February 2, 1973, together with the note from the Canadian Ambassador attached thereto.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

FEBRUARY 1973.

494-606—73

APPENDIX

DEPARTMENT OF STATE
THE LEGAL ADVISER
Washington, February 2, 1973.

DEAR MR. SOLICITOR GENERAL: I enclose herewith an authenticated copy of diplomatic note No. 41 dated January 31, 1973, from the Canadian Ambassador to the Secretary of State, presenting observations of the Canadian Government on the petition in the Supreme Court of the United States for a writ of certiorari to the Supreme Court of Florida in the case of *Confederation Life Insurance Company* v. *Reyes Arida Conte*, October Term, 1972, No. 72–966, and requesting transmittal of the note to the Supreme Court.

The Canadian Ambassador has personally called on me on instructions of his Government to emphasize the importance the Government of Canada attaches to a decision by the Supreme Court to grant the petition in this case.

In accordance with the request of the Canadian Ambassador, the Department of State would be obliged if you can transmit the note to the Supreme Court, together with this letter.

Sincerely yours,

CHARLES N. BROWER,
Acting.

Enclosure:
Diplomatic note from Ambassador of Canada

Honorable ERWIN N. GRISWOLD,
Solicitor General,
Department of Justice,
Washington, D.C.

CANADIAN EMBASSY,
Washington, D.C., January 31, 1973.

Hon. WILLIAM P. ROGERS,
The Secretary of State,
Washington, D.C.

SIR: I have the honour, acting on instructions of and on behalf of the Government of Canada, to present the following observations of my Government on the pending petition to the Supreme Court of the United States, October Term 1972, for a writ of certiorari to the Supreme Court of Florida, in the case of Confederation Life Insurance Company, a Canadian corporation, petitioner, v. Reyes Arida Conte, respondent. I have the further honour to request that this Note be transmitted to the Supreme Court for its consideration.

The Government of Canada, while not in any way making representations or expressing any opinion on questions of United States law, is desirous of registering its serious concern with respect to the effect of the decision of the Supreme Court of Florida entered on July 19, 1972 and its earnest desire that the judgment of the Florida Supreme Court be reviewed by the United States Surpeme Court.

In light of the fact that the petition in question has implications of serious magnitude for a large number of insurance policies underwritten by the Confederation Life Insurance Company to a value of millions of dollars, the Government of Canada is of the view that the Supreme Court may wish to take into account the following considerations when dealing with the petition.

If the Florida Supreme Court decision in this case remains unchanged, the provisions relating to the currency in which insurance policies issued outside the United States are to be payable, as stipulated in the insurance contracts themselves or by statute or regulation of the government of the territory in which the contract was made, could be over-ridden by bringing an action in a Florida court, thus effecting material changes in the contracts and, in some cases, providing a means for the evasion of foreign exchange control legislation of the state where the policies were issued. Further, since funds must be maintained by insurance companies to cover their liabilities for policies issued in any particular jurisdiction, and the Confederation Life Insurance Company has maintained funds in Cuba to the extent of its liabilities there as it has done in the United States in respect of policies underwritten in this country, any enforced obligation to meet financial claims arising from policies issued in Cuba by drawing on assets located elsewhere would run counter to international insurance practice. It would also undermine the regular conduct of business affairs which depend for their efficacy of operation—as do many types of enterprises engaged in international transactions—on an ability to conform to applicable regulations in the territory where contracts are made.

For these reasons and taking into account the current inconsistency among various U.S. court decisions involving comparable claims in respect of contracts of insurance underwritten in Cuba by foreign insurance companies, the Government of Canada is of the firm belief that a review of this issue by the United States Supreme Court is required to resolve the existing lack of uniformity of judgments within U.S. jurisdictions.

I trust that you may consider it appropriate to transmit this Note to the Supreme Court of the United States in order that the Court may be able to take into account the views of the Government of Canada when it considers the pending petition.

Please accept, Sir, the renewed assurances of my highest consideration.

Mr. CADIEUX,
Ambassador.

U.S. GOVERNMENT PRINTING OFFICE: 1970

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in the
Supreme Court
of the
United States

OCTOBER TERM, 1972

No. 72-966

CONFEDERATION LIFE INSURANCE COMPANY,
Petitioner,

vs.

REYES ARIDA CONTE,
Respondent.

REPLY BRIEF OF THE RESPONDENT TO THE PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF FLORIDA

The Respondent, accepts the references to the opinions below, jurisdiction and constitutional provisions involved as set out in the Petition.

QUESTIONS PRESENTED

In order to focus on the various issues, it is necessary to restate the questions presented by the Petitioner in the following manner:

1. Whether Florida has violated the due process clause of the 14th Amendment by its applying its own local law to an insurance contract performable within the State of Florida.

2. Whether Florida has transgressed international law and thus infringed the authority of the Federal Government over foreign affairs by applying local law to a transaction with which Florida has sufficient connection.

3. Whether Florida could disregard the effect of Cuban currency legislation and therefore has not acted inconsistently with the Act of State Doctrine, which is not mandatory upon the courts of the United States when the contract is governed by the law of one of the American states.

STATEMENT

The Respondent executed an application for life insurance with the Petitioner's company early in 1944[1] (Tr. 19). This application was eventually accepted by the Petitioner, whereupon, a policy was issued to the Respondent by the Petitioner and the first premium payment was made thereon in United States dollars, in Havana, Cuba

[1]References designated "Tr. —" are to the partial transcript of record file in the Supreme Court of Florida.

(Tr. 28,131). During this period, the value of the United States dollar and that of the Cuban peso were equivalent (Tr. 72-74). Consequently, payments for the insurance policy were accepted at this time in both Cuban pesos and United States currency (Tr. 73). The endowment portion of the policy provided for remittance to the Respondent after a period of 20 years, the sum approximating $4,000 in United States currency (Tr. 23). This provision also provided that acceptance of this amount was to be in Havana, Cuba, in United States dollars. However, prior to the date of maturity, acts by the Cuban government forced the Respondent to leave Cuba. After the Respondent's flight from Cuba, the premiums on the policy were paid by automatic premium loans (Tr. 135-36). In 1964, upon the maturity date of the endowment provision of the policy, the Respondent sought to have the Petitioner pay, in the United States in United States dollars, pursuant to the policy. The Respondent, at this time, had made all payments as required under the policy and had fulfilled all other conditions precedent to his recovery under the endowment provisions.

The Petitioner, Confederation Life Insurance Company, a Canadian Mutual Insurance Company, offered to pay the Respondent in pesos, if the Respondent would journey to Havana, Cuba, and subject himself to imprisonment within that country (Tr. 137). The insurance company argued that because Cuban legislation subsequent to the signing of the endowment insurance contract, stated any contract payable in dollars in Cuba would be converted to one payable to equivalent number of pesos; that any payment of the insurance contract would be paid in Havana, Cuba, in pesos.

The trial court, the District Court of Appeal for the 3rd District of the State of Florida, and the Supreme Court, State of Florida, all have acknowledged the obligation of the Petitioner to pay the Respondent in the United States. All three courts acknowledged that the equities of the situation could not be counter-balanced by the life insurance company's claim that its assets had been frozen in Cuba and cannot be removed. The sole issue in the Supreme Court of Florida was the question of whether the company should pay in dollars or in pesos. An important consideration which was presented before each court, was the fact that since Castro's rise to power, the value of the Cuban peso has dropped to a level far below par value of the United States dollar and that to grant any reward in such currency would be a distortion of the amount of money that Respondent paid into the insurance company.

The Supreme Court of the State of Florida allowed the Respondent to recover in United States currency. The court relied upon the law of *Lara v. Confederation Life Association*, 257 So. 2nd 42 (Fla. 1971), upon which this court has already denied certiorari. The Florida Supreme Court, after analyzing all previous decisions, made it clear that *Confederation Life Association v. Ugalde*, 164 So. 2nd 1 (Fla.), Cert. denied, 379 U. S. 915 (1964), was no longer the law of the state. The court clearly demonstrated that the equitable questions involved along with the state's substantial contact with the hundreds of thousands of Cuban refugees who have fled into the State of Florida since the rise of Castro, would enable it to apply a reasonable solution to an otherwise possibly unfair result. The Florida court, when applying its laws, compelled the life insurance company to meet its obligations based on the

insurance contract for which it had received funds during a 20 year period. Secondly, the Florida Supreme court found that the equities of the situation and the contact between the Cuban refugees and the State of Florida and the need to protect their welfare, gave the State of Florida sufficient contact to apply local law rather than look at foreign law. Throughout the proceedings below, it is evident that the Florida courts have not considered it necessary to apply the Act of State Doctrine because of the nature of the claim, and a belief that this doctrine does not apply because of Cuba's leaving the International Monetary Fund.

REASONS FOR DENYING THE WRIT

The Supreme Court has previously reviewed the issues in this case in *Confederation Life Insurance Co. v. Lara*, No. 71-1487, in which the Court denied certiorari.[2] The allegations presented before the court in that case are substantially the same as the contentions presented by the Petitioner in the instant case.

The Petitioner argues that the State of Florida had no substantive reason for applying its local law, because the State lacked sufficient contact with the subject matter and, furthermore, all conditions and incidents of the contract took place in Cuba. Consequently the Petitioner argues that Cuban law, not Florida law, should apply.

However, it is the Respondent's contention that even though the situs of the original insurance contract may have been Cuba, the situs of the endowment provision of

[2]Certiorari was denied on October 23, 1972.

this contract was Florida. The original insurance contract entered into in Cuba on the 8th day of February, 1944, states on its face as follows:

> "The Confederation of Canada Life Insurance Association, by virtue of this policy of insurance and in accordance with the conditions herein stated, agrees to pay the sum of Four Thousand Dollars to the insured, if living, on the 8th day of February, 1964, but should the insured die before, while this policy is in force, to the legal heirs, executors, administrators or assigns of the insured . . . ."[3]

The words quoted above make the insurance contract a conditional contract, and, therefore, one which could not be completed until the condition was performed. The insured must die before the insurance company is obligated to pay benefits to his heirs. Further, as in the instant case, the insured must live until February of 1964 before he could receive payment on the endowment provision of the contract. Generally, a contract is considered as having been entered into in that place in which the last act to complete the contract is performed. 17 C. J. S. Contract §12.2-12.5 (1963). Consequently, the endowment provision of the policy constitutes a continuing irrevocable conditional offer by the company to pay, which offer matures into an obligation to pay only upon the conditions having been satisfied.

In addition to the performance of the conditional contract being in Florida, the Florida court had sufficient contact with the subject matter in the instant case to

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[3]This statement can be found in (Tr. 19).

acquire jurisdiction over it and therefore to apply its local law. If the primary question, in the instant case, revolves around Florida's application of its local law, rather than applying the law of the place where the contract was signed, it is necessary to indicate that the basic premises for the application of any conflict of laws doctrine extends beyond the mere principle of lex loci contractus. The forum, state, if it has significant contacts with the matter in dispute, has jurisdiction over the subject matter and can apply its local laws to the case. *Fleet Messenger Service, Inc. v. Life Insurance Company.* (CA2NY) 315 F. 2d 593; *Royce Chemical Company v. Sharples Corp.* (CA2NY) 285 F. 2d 183.

The reason for the necessity of acknowledging the above precept is clear when it is realized that the conflict of law doctrines are not limited to mechanical steps, but reflect the gravity of the issues. The equities of the situation, regardless of phantom-like qualities, are often considered. The consideration of these issues tempers the court's willingness or unwillingness to apply what it views as the right law. There is nothing repugnant to the due process clause when a court permits the application of its local law to the question at issue, when that state's public policy or interest in the subject matter so justifies. *Union Trust Company v. Grossman*, 245 U. S. 412, 38 S. Ct. 147, 62 L. Ed. 368; *Galveston, H. & S. A. R. Co. v. Wallace*, 233 U. S. 481, 32 S. Ct. 205, 56 L. Ed. 516.

The contacts that the State of Florida had with the case at bar were more than sufficient to grant it jurisdiction. Both parties were present within the State of Florida, the Petitioner was a corporation doing business within Florida and holding assets in the United States. The Re-

spondent is representative of over 200,000 Cuban refugees who live in the State of Florida. The fact that the State of Florida is cognizant of their welfare and their needs does not require substantiation beyond the evidence that the Supreme Court of the State of Florida's series of decisions has demonstrated that its policy is one of enforcing the claims of Cuban refugees upon corporations that entered into obligations with these refugees while they were in Cuba.[4]

It is easy to perceive that Florida has a vested interest in the welfare of Cuban refugees.

The Petitioner, cognizant of the importance of the contacts between the State of Florida and the Respondent, has presented several cases attempting to demonstrate the position that Florida in applying its local law was violative of the 14th Amendment due process clause. However, none of these cases are of significant importance. In each case concerning the application of local law between states within the United States, it was deemed that the forum state did not have any contact with the issues. However, the court in *Clay v. Sun Insurance Office, Ltd.*, 377 U. S. 179, (1964), affirmed the permissibility of applying local law if the state had sufficient reason and contacts as in the instant case. The situation in the present case can be easily distinguished from the one found in *Home Insurance*

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[4]The series of decisions so demonstrating are: *Confederation Life Association v. Vega y Armnian*, 207 So.2nd 33, (Fla. 3rd Dist. 1968), affirmed 211 So. 2nd 169, (1968); *Lara v. Confederation Life Association*, 250 So. 2nd 42, (Fla. 1971), Cert. denied, No. 71-1487, Oct. 23, 1972; *Confederation Life Association v. Reyes Arida Conte*, 254 So. 2nd 45, Cert. granted, Sup. Ct. Fla. No. 41,888 July 19, 1972.

Company v. Dick, 281 U. S. 397 (1930) because Florida has sufficient contacts herein. These contacts extend beyond the mere fact that the Respondent lives in Florida. Florida has accepted the responsibility for the welfare of over 200,000 refugees, in addition, the Petitioner does business within the state and has assets within the state that can be readily used to satisfy any judgment against them. The Petitioner tries to further substantiate its claim that the contacts in the subject case were wholly inadequate by citing *Hartford Accident & Indemnity Company v. Delta & Pine Land Company*, 292 U. S. 143, (1934), to demonstrate that the relationship between the forum state and the issues was too limited to permit application of the forum state's law. However, the Hartford case, quite to the contrary, expressed within its opinion clear evidence that if contacts are sufficient, the forum state may apply its local law:

> "Cases may occur in which the enforcement of a contract as made outside a state, may be so repugnant to its vital interests as to justify its enforcement in a different manner." 292 U. S. at 150.

It is apparent that if contacts are sufficient, the forum state can apply its local law. The Petitioner, however, urges that even if the state has sufficient contacts, the Act of State Doctrine would prevent the forum state from applying its local law instead of the law of Cuba. To the contrary, the Act of State Doctrine applies only to agreements whose center of gravity is within the territorial dominion of foreign states. *Mann v. Compania Petrolia Trans Cuba, S. A.*, 32 Misc. 2nd 790, 223 NYS 2d

900, (1962). The doctrine does not apply to contracts that are governed by the law of one of the American states. *Pan American Life Insurance Company v. Blanco*, (S. D. Fla. 1963) 221 F. Supp. 219, affirmed 362 Fed. 2d, 167. As previously presented, the contract was performed in the United States and subject to law of the state in which performance occurred.

However, for the sake of argument, if it is conceded for the present that the State of Florida did not have sufficient contacts to warrant the use of local law, it still can be demonstrated that the Act of State Doctrine does not compel the courts of the United States to apply foreign law. The Act of State Doctrine is based upon the relationship between states called comity, and comity is not an absolute obligation. *Hilton v. Guyot*, 159 U. S. 113, 16 S. Ct. 139, 40 L. Ed. 95. The laws of a foreign state have no extra territorial effect aside from the courtesy of one state to apply its laws. *U. S. v. Belmont*, 301 U. S. 324; 57 S. Ct. 758, 81 L. Ed. 1134; *U. S. v. Curtis Wright*, 299 U. S. 304, 57 S. Ct. 216, 81 L. Ed. 255. Mr. Justice Harland in delivering the court's decision in *Banco Nationale de Cuba v. Sabbatino*, 376 U. S. 398, announced:

> ". . . international law does not require application of the doctrine as evidenced by the practice of nations. Most of the countries rendering decisions in the subject failed to follow the rule rigidly." 376 U. S. at 421.

Consequently, mandatory application of the Act of State Doctrine has not been the practice of the courts in the United States.

Although the court in *Sabbatino* seemingly paints a broad application of the Act of State Doctrine, Mr. Justice Harland clearly indicated that the doctrine as enunciated within the court's decision in *Sabbatino* would be limited to a very narrow area.

> "Therefore, rather than laying down or reaffirming any inflexible and all encompassing rule in this case, we decide only that the judicial branch will not examine the validity of taking a property within its own territory by a foreign sovereign government, extant and recognized by this country at the time of suit, in the absence of a treaty or other unambiguous agreement regarding controlling legal principles, even if the complaint alleges that the taking violates customary international law." 376 U.S. at 423.

Aside from the fact that this court narrowly applies the Act of State Doctrine, it is necessary to point out that the State of Florida applied the required recognizable standard, mentioned in *Sabbatino* by following the Bretton Woods Agreement, commonly known as the International Monetary Fund Agreement, December 27, 1945, Article 8, 60 Stat. 1401. The State of Florida in its decisions; *Confederation Life Association v. Vega y Armnian*, 207 So. 2nd 33, (Fla. 3rd Dist. 1968), affirmed 211 So. 2nd 169, (1968); *Lara v. Confederation Life Association*, 250 So. 2nd 42, (Fla. 1971), Cert. denied, No. 71-1487, October 23, 1972; *Confederation Life Association v. Reyes Arida Conte*, 254 So. 2nd 45, Cert. granted, Sup. Ct. Fla. No. 41,888 July 19, 1972, acknowledged that the monetary laws of a non-member nation are not given extra terri-

torial effect by terms and conditions of the Brentton Woods Agreement. This agreement provides an observable standard that is clear and unambiguous. The agreement prohibits the use within a member signatory of the agreement, the use of non-member foreign monetary laws. The Supreme Court of Florida viewed Cuba's failure to remain within the monetary fund as sufficient reason for the United States not to apply Cuba's monetary laws in accordance with the agreement.

In addition to complying with the spirit of the *Sabbatino* decision by following the standard outlined therein, it is equally important to note that the courts of the United States have long ignored the Act of State Doctrine when public policy would be contravened by application of the doctrine. 17 Am. Jur. 2d, Contracts §420. The United States has long refused to enforce the penal laws of a foreign country. Similarly, revenue laws of sovereign countries have been denied enforcement within this country.[5] This application of public policy to limit the Act of State Doctrine is, particularly exhibited in the area of foreign confiscatory decrees. *Moscow Fire Insurance Company v. Bank of New York*, 280 N.Y. 286, N.E. 2nd 758, (1939). The courts have gone so far as to recognize the private property rights of foreign individuals after their own governments have denied them the right to continue ownership of such property. *Second Russian Insurance Company v. Miller*, 297 Fed. 404, (C.A. 2d CIR.). Although these cases do not represent the same issues that are presented before this court, they clearly indicate the vari-

[5] See Mr. Justice White's dissent in Banco Nationale de Cuba v. Sabbatino footnotes 9 and 11.

ous courts willingness to avoid the Act of State Doctrines for those areas of public policy that the court deems of significant importance to counter-balance the need to follow foreign law.

It is evident that the Supreme Court of the United States has final review on any federal question, but the state courts are free to determine whether a given matter is to be decided under the law of the forum or any other law. Nothing in the Constitution of the United States insures that foreign countries will have unlimited extra territorial recognition of their laws. *Klaxon Company v. Stentor Mfg. Co.*, 313 U. S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477.

CONCLUSION

It follows from the above presented arguments that the State of Florida was justified in applying its own law to the case at bar. This justification stems from the fact that the contract was performed in Florida and Florida had other sufficient contacts to warrant its finding jurisdiction over the subject matter. Florida did not violate the Act of State Doctrine because the Act of State Doctrine was inapplicable to the laws because of Florida's relationship with the matters in dispute. Furthermore, the Act of State Doctrine would not be applicable because of Cuba's failure to remain a member of the International Monetary Fund. In addition, it is evidenced that the United States courts have not blindly applied any Act of State Doctrine but have carefully examined the situation and equities involved and rendered an appropriate decision. It is therefore urged that this Petition for a Writ of Certiorari be denied.

Respectfully submitted,

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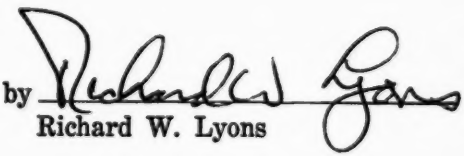
February 1973

by 
Richard W. Lyons

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Respondent's Reply Brief was mailed to JOHN G. LAYLIN, WILLIAM H. ALLEN and MICHAEL BOUDIN, at 888 Sixteenth Street, N.W., Washington, D.C. 20006; and to THOMAS H. ANDERSON, PHILLIP G. NEWCOMM at: SHUTTS & BOWEN, 1000 First National Bank Building, Miami, Florida 33131; and to COVINGTON & BURLING, 888 Sixteenth Street, N.W., Washington, D.C. 20006, attorneys for Petitioner, this 7 day of February, 1973.

LYONS AND SMITH, P.A.
Attorneys for Respondent

By: Richard W. Lyons
RICHARD W. LYONS

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MICHAEL RODAK, JR.

No. 72-966

IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

CONFEDERATION LIFE INSURANCE COMPANY,
Petitioner,

v.

REYES ARIDA CONTE,
Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Florida

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REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondent states without qualification that the Florida courts have applied local Florida law in allowing him to recover in dollars in Florida on his contract of insurance with petitioner Confederation Life Insurance Company. Thus, as stated in the petition, the issues of constitutional law and international law that petitioner poses here, which arise from the Florida courts' choice of Florida law instead of Cuban law, are not clouded by any vagrant possibility that Florida may have been applying the local, Canadian or Ontario, law of Confederation's domicile.

The issues of federal law are therefore sharply focused. Respondent's attempts to suggest a basis on

which the issues can be resolved in favor of sustaining the action of the Florida courts are hopelessly inadequate, for reasons indicated below.

I

Respondent's contract with Confederation was a 20-year endowment life insurance policy issued in Cuba in 1944. In exchange for respondent's premiums Confederation promised to pay the amount of the policy to him on the twentieth anniversary date of the contract if he was living or to his heirs if he died before that date. Respondent was alive on the anniversary date, in 1964, and Confederation at that time became obligated to him under the terms of its contract.

Under Cuban law the obligation, as we have explained in the petition, was to pay the respondent 4,000 pesos in Havana. The contract was made in Havana, was performable by its terms in Havana and was made with a Cuban citizen and domiciliary, the respondent. Moreover, by decrees of the duly constituted Cuban government withdrawing Cuban legal tender status from the currency in which the contract was originally expressed, United States dollars, and forbidding the payment of Cuban obligations otherwise than in Cuban pesos, the obligation could be satisfied only by payment in pesos in Cuba. Confederation stood and stands ready to make such payment.

Respondent attempts to bring himself under the doctrine, as it once might have been narrowly understood, of *Confederation Life Ass'n* v. *Vega,* 207 So.2d 33 (Fla. Dist. Ct. App.), *aff'd,* 211 So.2d 169 (Fla.), *cert. denied,* 393 U.S. 980 (1968), by urging that the endowment feature of his original life insurance con-

tract was the equivalent of an option pursuant to which a second contract was made in Florida. The suggestion is wholly lacking in substance.

In *Vega* the insured exercised in Florida a cash surrender option contained in a policy that had been issued in Cuba. It was said by the Florida court that this constituted the making of a second contract in Florida. Even as applied in *Vega*, this "second contract" doctrine is without support in authority and is thoroughly unsound. But respondent's attempt to stretch the doctrine so as to create a second contract upon the mere satisfaction of a condition—survival for 20 years—lacks even the superficial plausibility of the *Vega* construct. To say, as respondent does (Br. 6), that a conditional contract is not completed until the condition occurs is contrary to the most elementary principles of contract law. A contract is completed by the acceptance of an offer. The fact that the offer contains a promise that is conditioned or calls for a conditional promise in return—as insurance contract offers do, almost by definition—does not make the contract any less complete when the last act necessary to constitute acceptance occurs. 1 Corbin, *Contracts* § 83 (1963). In this case the relevant acts necessary to complete the contract took place in Cuba, not Florida.

The Florida District Court of Appeal in this case expressly rejected the argument that respondent now advances, stating: "We are unable to discover a second contract with a situs in the United States under these facts." (Pet. 3a). The Florida Supreme Court, although it allowed respondent an even larger dollar recovery than did the District Court of Appeal, did not even hint that it disagreed with the District Court of Appeal on the second contract issue.

Instead, the Florida Supreme Court held in substance that Florida law was applicable to the Cuban policy here involved without regard to "second contracts," Canadian law, or any other ameliorative qualification. If there was any doubt about the position of the Florida Supreme Court when *Confederation Life Ins. Co.* v. *Lara,* No. 71-1487, was pending in this Court, it has now evaporated, and the constitutional and other federal issues are squarely and unavoidably presented.

II

Respondent makes an alternative argument for the lawfulness of applying Florida law. Forgetting the alleged second contract, he urges that Florida has sufficient contacts with the only real contract in the case, the contract that in 1944 was made in Cuba to be performed there, to justify applying its law. (Resp. Br. 6-10)

Only two contacts are mentioned.

First, respondent points out that Confederation does business in Florida and has assets in the United States. Confederation's holding of assets in the United States is utterly immaterial as a contact with Florida. Confederation's doing business in Florida is probably a sufficient foundation for personal jurisdiction over it on the part of the Florida courts, but the satisfaction of jurisdictional requisites has never been regarded as conclusive of or even especially pertinent to choice of law. If the forum state could apply its law to any defendant over whom its courts have jurisdiction, there would be scant need for choice-of-law rules. Nor would cases such as *Home Ins. Co.* v. *Dick,* 281 U.S. 397 (1930), and *Hartford Accident & Indem. Co.* v.

Delta & Pine Land Co., 292 U.S. 143 (1934), holding unconstitutional the application of forum law to transactions involving parties over whom the courts had jurisdiction, have been decided as they were.

The second contact respondent mentions is only slightly more serious. He says that he lives in Florida and attempts to bolster this assertion by adding that he is among 200,000 Cuban refugees who similarly live in Florida. The plaintiff in *Home Ins. Co.* v. *Dick, supra,* was a citizen and permanent resident of Texas who had invoked the legal system of his own state; he was, if you will, a representative of that state's entire citizenry, not just of a few thousand residents of a particular kind (compare Resp. Br. 7-8). This Court said: "The fact that Dick's permanent residence was in Texas is without significance." *Id.* at 408. That ruling alone concludes respondent's argument. But the fact is that, even were the residence of respondent and of other Cuban refugees in Florida sufficient to justify the application of Florida law, the Florida courts obviously do not look upon the state's role as defender of the interests of the Cuban refugees within its borders as justification for their decisions imposing liability to pay dollars on Cuban insurance contracts. The *Lara* case, which respondent says raised the same issues as this case, demonstrates that. In the *Lara* case four of the six beneficiary-plaintiffs resided elsewhere than in Florida. One of them still lived in Havana.

III

In his final argument respondent rests upon the surprising assertions that "mandatory application of the Act of State Doctrine has not been the practice of the

courts in the United States" (Br. 10) and that "this court narrowly applies the Act of State Doctrine" (Br. 11). These statements and the argument based upon them simply cannot be squared with what this Court held and said in *Banco Nacional de Cuba* v. *Sabbatino,* 376 U.S. 398 (1964), or more recently, in *First Nat'l City Bank* v. *Banco Nacional de Cuba,* 406 U.S. 759 (1972), about the duty of courts in the United States to respect acts of foreign governments affecting rights and obligations within their territories. We have quoted the act-of-state rule before, and we quote it again here: "[W]hen it is made to appear that the foreign government has acted in a given way on the subject-matter of the litigation, the details of such action or the merit of the result cannot be questioned but must be accepted by our courts as a rule for their decision." *Banco Nacional de Cuba* v. *Sabbatino, supra* at 418, quoting *Ricaud* v. *American Metal Co.,* 246 U.S. 304, 309 (1918).[1]

Here Cuba has acted upon the subject-matter of this litigation, the respondent's life insurance contract, in such a way as to make it a policy payable only in pesos and only in Havana. Cuba had full power to act as it did, and no question could possibly be raised under international law concerning its action. (See Pet. 14-15.) The passage from *Sabbatino* that is quoted at page 11 of the brief in opposition, which talks in terms of the Court's not examining the validity of a taking

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[1] If respondent's statement that the act of state doctrine is not "mandatory" is intended to suggest that state courts may disregard the doctrine as they choose, then respondent's position is squarely inconsistent with *Sabbatino.* This Court made clear in *Sabbatino* that the constraints of the act of state doctrine are as binding upon the state courts as upon federal courts. 376 U.S. at 421-24.

of property by a foreign government within its own territory, was addressed to the argument that was made by the respondents in *Sabbatino* that the act of state doctrine should not be applied where a taking violates international law because it is uncompensated or discriminatory.[2] The act of state doctrine is fully applicable to legislation or decrees affecting contractual interests as well as tangible property. (See Pet. 15 n.9.) *Sabbatino* did not suggest the contrary.

Respondent wholly misconceives the course of decisions of the Florida courts as they relate to the International Monetary Fund agreement. (Br. 11-12.) At one time Cuba was a member of the International Monetary Fund, and the agreement to which it and the United States were parties was one of the grounds of decision in *Confederation Life Ass'n* v. *Ugalde,* 164 So.2d 1 (Fla.), *cert. denied,* 379 U.S. 915 (1964), denying recovery on a Cuban insurance contract in part because under the agreement the United States was bound to respect Cuba's monetary laws. (See Pet. 6-7.) Cuba has withdrawn from the IMF agreement, and the argument based on the agreement has of course not been advanced since the withdrawal. But Cuba's withdrawal certainly had nothing like the effect that respondent attributes to it of precluding courts in the United States from respecting Cuban monetary decrees. There is nothing in the agreement, as respondent asserts, that prevents the courts of a member country, in the application of ordinary choice-of-law rules or in obedience to the act of state doctrine, from giving effect to a non-member's monetary laws.

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[2] The quoted passage, interestingly, demonstrates that the cases that respondent relies on in which confiscatory foreign decrees were ignored (Br. 12) are no longer authoritative after *Sabbatino.*

CONCLUSION

The general importance of the issues raised in this case has been reemphasized by the personal delivery by the Canadian Ambassador to the Acting Legal Adviser of the Department of State of a note expressing the concern of the Canadian Government over the course of judicial decisions in Florida and its desire that the judgment in this case should be reviewed by this Court. The note and the Acting Legal Adviser's letter of transmittal to the Solicitor General have been submitted to the Court by the Solicitor General.

Respondent says nothing that detracts from the importance of the issues in the case. And, as has been seen, his arguments that the issues were properly resolved below are unsubstantial. The petition should be granted.

Respectfully submitted,

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